

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. CG 02-278

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Executive Summary

GroupMe submits these reply comments supporting its Petition for Expedited Declaratory Ruling and Clarification. Unsurprisingly, the only parties opposing the GroupMe Petition are Telephone Consumer Protection Act (“TCPA”) plaintiffs or attorneys that represent such plaintiffs. As such, all of these commenters have a direct pecuniary interest in continuing the misinterpretation of the TCPA and attempting to broaden its scope beyond its purpose regulating intrusive commercial communications. The record in this proceeding clearly demonstrates that Commission action is critically needed to clarify the issues raised by the Petition. The TCPA is currently being interpreted by litigants in a manner that stifles innovation, restricts the deployment of consumer-friendly services, and interferes with informational communications to wireless subscribers. A number of rational clarifications of the TCPA are needed to ensure that Congressional intent is not thwarted, and doing so will in no way undermine consumer protection.

In these reply comments, GroupMe addresses several commenters’ misguided claims concerning its services, corrects the record about maximum default group size, and provides further details about the group size. While wholly irrelevant to the legal questions raised in the GroupMe Petition, GroupMe continues to modify its services in response to user feedback, and has recently changed the maximum group size from 25 to 50. It has not received complaints of “spam” associated with this modification and the use of its services remains unchanged. Further, GroupMe responds to those claims made that its services are somehow “commercial.” The free group texting and calling services that are the subject of the GroupMe Petition prohibit commercial use and GroupMe does not send commercial text messages. GroupMe also responds to commenter claims that its service utilizes a predictive dialer functionality, specifically, by

demonstrating that: 1) GroupMe is responsible for only a limited set of communications as opposed to predictive dialers that initiate thousands of communications; 2) the non-telemarketing, informational and administrative text messages triggered in response to the creation of a group sent by GroupMe are few; 3) the database containing GroupMe group numbers is not populated by, or under the control of, GroupMe; and 4) GroupMe's service does not rely on predictive dialer algorithms to send communications. Instead, GroupMe's text messages are triggered for a limited time when a group is created and the group creator initiates the initial group text message(s). Thereafter, GroupMe enables communications initiated by other parties.

Finally, GroupMe demonstrates that the record in this proceeding clearly illustrates that there are many times when obtaining prior express consent directly from the recipient of a call or text message is simply not possible, and reiterates its request that the Commission clarify that for non-telemarketing, informational, administrative calls or text messages to wireless numbers, which can be permissibly made using an automatic telephone dialing system ("ATDS") under the TCPA with the called party's oral prior express consent, the caller can rely on a representation from an intermediary that such intermediary has obtained the requisite consent from the called party.

Granting the relief requested by GroupMe would not open a floodgate of spam as some commenters claim. GroupMe's Petition concerns only non-telemarketing, informational, and administrative text messages and calls such that any clarification the Commission provides would be so limited. GroupMe respectfully requests that the Commission clarify the relevant provisions of the TCPA as set forth in the GroupMe Petition.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
Rules and Regulations Implementing the)
Telephone Consumer Protection Act of 1991)

Petition of GroupMe, Inc./)
Skype Communications S.A.R.L.)
For Expedited Declaratory Ruling)

CG Docket No. 02-278

REPLY COMMENTS OF GROUPME, INC.

GroupMe, Inc. (“GroupMe”), by its undersigned counsel, respectfully submits these reply comments supporting its Petition for Expedited Declaratory Ruling and Clarification¹ pursuant to the Public Notice issued July 24, 2012, by the Federal Communication Commission (“Commission” of “FCC”) in the above-referenced proceeding.² The record demonstrates that Commission action is critically needed to clarify the issues raised by the Petition. Litigation has proliferated to a frenetic level where confirmatory opt-out text messages,³ informational calls and text messages

¹ See *GroupMe, Inc.*, Petition for Expedited Declaratory Ruling and Clarification, CG Docket No. 02-278 (filed Mar. 1, 2012) (“GroupMe Petition”).

² *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from GroupMe, Inc.*, DA 12-1180 (rel. Jul. 24, 2012) (“Public Notice”).

³ See *SoundBite Communications Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Feb. 16, 2012); see, e.g., Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 5 (filed Aug. 30, 2012) (“Over one dozen federal class action lawsuits have been filed against companies such as Facebook, Twitter, the NFL, and American Express, alleging that their practice of sending a confirmatory message that a consumer has opted out of receiving additional communications violates the TCPA.”).

relating to flight status information, product recalls, data breach notifications, and non-commercial text messages enabled by social media tools are forming the basis of putative class action lawsuits where “professional plaintiffs” seek tens of millions of dollars in statutory damages.⁴ The comments make clear that the current impact of the Telephone Consumer Protection Act (“TCPA”) is to stifle innovation, restrict the deployment of consumer-friendly services, and interfere with informational communications to wireless subscribers.⁵ Failing to rationalize the TCPA will allow the deluge of litigation to continue and will do nothing to further the consumer protection policies that informed the TCPA and the Commission’s rules.⁶ The TCPA’s ambiguity results in a windfall to plaintiffs’ attorneys that continue to bring class action lawsuits based on absurd interpretations that neither Congress nor the FCC intended. Much needed clarity from the Commission would promote innovation in the communication marketplace without sacrificing the consumer protection policies of the TCPA.

⁴ See GroupMe Petition, at 2 n.4, 3 n.5, 12 n.23, and 15 n.32.; *SoundBite Communications Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Feb. 16, 2012); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 4 (filed Aug. 30, 2012).

⁵ See, e.g., Cargo Airline Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, at 3 (filed Aug. 17, 2012) (“Unfortunately, because of uncertainty over the scope of the TCPA restrictions, CAA members currently provide only a limited number of consumer-friendly package notifications to wireless telephone numbers.”) (internal citations omitted); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 5 (filed Aug. 30, 2012) (“This litigation inhibits non-marketing communications important to consumers.”).

⁶ See, e.g., Comments of Twilio, Inc., CG Docket No. 02-278, at 5, 5 n.14, n.15 (filed Aug. 30, 2012) (detailing numerous TCPA-related class action lawsuits). Many of these complaints are filed by the same plaintiffs’ law firms using boilerplate complaints. See *id.*; Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 4-5, 5 n.12 (filed Aug. 30, 2012) (noting that a judge recently admonished one such plaintiffs’ law firm for seeking large fees even though the complaint amounted to minor modification of a pre-existing form).

The record also demonstrates that the only parties filing in opposition to the GroupMe Petition are TCPA plaintiffs or their attorneys.⁷ As such, all of these commenters have a direct pecuniary interest in continuing the misinterpretation of the TCPA and attempting to broaden its scope beyond its purpose. Thus, those commenters that claim that GroupMe's services are subject to the TCPA must be viewed in light of the direct financial interest that these parties have in expanding the flood of frivolous lawsuits that have been filed for alleged TCPA violations and they do not represent consumer interests.⁸

In these reply comments, GroupMe addresses several commenters' incorrect statements concerning the provision of its services. Further, GroupMe responds to several spurious claims made by commenters that GroupMe's service is commercial. Likewise, GroupMe reiterates its requests that the Commission clarify the term "capacity" and the scope of the definition of an automatic telephone dialing system ("ATDS"). GroupMe also distinguishes its system from predictive dialers. Finally, GroupMe demonstrates that the record in this proceeding clearly illustrates that there are many times when obtaining prior express consent directly from the recipient of a call or text message is simply not possible, and emphasizes that the Commission must clarify that for non-telemarketing, informational calls or text messages to wireless numbers, which can be permissibly made using an ATDS under the TCPA with the called party's oral

⁷ See, e.g., *Jimmy Sutton v. Pistone & Wolder*, G041531 (Cal. Ct. App.); *Joe Shields v. Americor Lending Group, Inc. et al.*, NO. 01-06-00475-CV (Tex. App.); *Gerald Roylance v. ADT Security Services, Inc. et al.*, No. 5:08-cv-01101-JF (N.D. Ca.); *Diana Mey v. Monitronics International, Inc. et al.*, No. 5:11CV90 (N.D. W.V.); *Robert Biggerstaff v. Low Country Drug Screening*, No. 99-SC-86-5519, (Magis. Ct. S.C.). Likewise, the Consumer Litigation Group (Law Office of Dimitrios Kolovos, LLC) Edelson McGuire LLC, and Michael C. Worshamall represent plaintiffs in TCPA lawsuits. See <http://consumerlitigators.com/about-us/>; <http://www.edelson.com/case/6/>; <http://worshamlaw.com> (last visited Sept. 10, 2012).

⁸ A list of these and other TCPA-related cases, including others filed by the commenters in this proceeding, is listed on the website: <http://www.tcpalaw.com/free/cases.htm> (last visited Sept. 10, 2012).

prior express consent, the caller can rely on a representation from an intermediary that such intermediary has obtained the requisite consent from the called party.

I. ADDITIONAL DETAILS REGARDING GROUPME'S OFFERING

GroupMe would like to correct the record with respect to the default group size associated with its service. At the time the Petition was filed and as represented in the Petition, the maximum group size was 25. For the reasons detailed herein, the maximum group size was changed from 25 to 50 on March 19, 2012, after the Petition was filed. In meetings with the Commission on July 16, 2012, and in the accompanying *ex parte* filing,⁹ GroupMe wrongly stated that the default group size was still 25. GroupMe apologizes for the mistake and any confusion it may have caused but, for the reasons identified herein, the company does not believe the change in the group size has any impact on the non-commercial nature of its service and its continued importance as a social media tool.

As detailed in its Petition, GroupMe provides a non-commercial, group texting and social media tool that is free to users.¹⁰ GroupMe is constantly improving its offering to enhance the end user experience. As the service's popularity grew, numerous users requested an increase in the default group size of 25. From neighborhood watch groups, to emergency personnel, like professional and volunteer firefighters, police officers and providers of emergency medical services, to church groups, to coaches, to fraternities and sororities, GroupMe received many

⁹ See, Ex Parte Letter from Ronald W. Del Sesto, Jr, counsel for GroupMe, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2-3 (filed July 18, 2012) ("*GroupMe July 18 Ex Parte*"). Note that groups still cannot be chained together such that a group creator or member could string multiple groups together to circumvent the default group size of 50.

¹⁰ See GroupMe Petition, at 4-8.

legitimate requests to raise the default limit.¹¹ As these requests became more frequent, manually overriding the default group limit caused GroupMe to devote more and more of its limited support resources to handle these requests. The company also found that when it investigated requests for larger groups, it would typically determine that the requests were reasonable in light of the social, non-commercial needs of the group users. Moreover, the company had not received any customer complaints of fraud or mass spamming from malicious users. Thus, on March 19, 2012, GroupMe raised the default group size from 25 to 50, and the company continues to prohibit group creators and members from chaining groups together.

GroupMe chose a new default group size limit of 50 for a number of reasons. First, most of the requests for an increase in group size came from users that wanted a group that ranged in size from 27 to 30 members. Raising the default group size to 50 would easily accommodate most requests. Second, GroupMe wanted to make sure that any increase in the default group size limit would not result in transforming the service from a personal communications and social media tool to a mass communication tool. Third, and finally, raising the limit to 50 eased the burden on GroupMe's limited support staff.

While the new limit has been in place for less than six months, it has been a success. The average group size has not significantly increased. When the default group size was 25, the average group size was 4.84 (approximately 5). Currently, the average group size is 5.27 (approximately 5). The average group size for those groups that exceed 25 is approximately 38. The overall percentage of groups that exceed 25 as compared to total groups served by GroupMe is approximately 0.5%. There still have been no complaints relating to spamming or other com-

¹¹ See <http://help.groupme.com/entries/20003747-increase-the-group-size-limit> (last visited Sept. 10, 2012). The link shows numerous users' request for an increase in the default group size and the reason why the request is being made.

mercial use of the service. All of the data demonstrate that the overwhelming use of the service continues to be by small groups of people and that the larger groups using the service are using it as an informational or social media tool in conformity with the intent of the creators and the Terms of Service. Finally, increasing the default group size has also allowed GroupMe to devote less of its support resources to processing requests to increase group sizes.

II. OPPOSING PARTIES MISREPRESENT THE FACTS ASSOCIATED WITH GROUPME'S OFFERING

Plaintiffs and plaintiffs' attorneys opposing the Petition make baseless claims falsely asserting that GroupMe intends to send commercial text messages through its service. Mr. Glauser cites to a recent expert declaration,¹² filed by his lawyers, Edelson McGuire, in one of the many class action lawsuits claiming violation of the TCPA. The expert declaration is likely the "evidence" "contradicting" GroupMe's representations in its Petition as referenced by Edelson McGuire in its request for an extension of time to submit comments.¹³ Mr. Glauser's purpose in citing the declaration is to say that long-code is becoming more common for advertising and marketing text messages and by implication that, because GroupMe uses long-code, it is evidence of GroupMe's commercial nature. The expert declaration is presented out of context (to say the least) as the expert testimony concerns a service and dispute that has no relationship whatsoever to GroupMe's, and, as such, is irrelevant to this proceeding.

First, the at-issue declaration does not rely much on the use of long-codes for its conclusion that an ATDS was used in that case. The declaration, addressing a marketing campaign, states that advertisers are starting to use long-codes. More centrally, though, the declaration

¹² See Attachment 1.

¹³ Brian Glauser, *Unopposed Motion for Extension of Time to File Comment on Petition for Declaratory Ruling Filed by GroupMe Inc./Skype Communications S.A.R.L.*, CG Docket No. 02-278, at 1-2 (filed Aug. 30, 2012).

relies on the fact that approximately 60,000 text messages in that case were sent in 3 to 5 second intervals and were “always made to the cellular telephone numbers in ascending sequential order,”¹⁴ including by area code. It was the calls in “such rapid succession and in a regular and periodic order”¹⁵ that led the expert to believe that they “must have been made from a single automated system.”¹⁶ The expert’s conclusion had little (if anything) to do with the use of long-codes; it had to do with actual systematic, sequential number generation and dialing without human intervention and the expert was not providing analysis of GroupMe’s services. That conclusion is in paragraphs 20-22 of the declaration attached hereto as Attachment 1.

Second, despite both Edelson McGuire and Mr. Glauser’s attempts to cast GroupMe’s administrative text messages as commercial, GroupMe was not marketing anything even if it was using long-codes to send text messages. Moreover, this portion of Mr. Glauser’s comments should not be mistaken for legal argument as it merely describes some actors in the commercial advertising space.¹⁷ The expert’s testimony begins from the assumption that a particular communication is commercial rather than addressing whether a particular communication is commercial in the first instance.¹⁸ Accordingly, this portion of the Mr. Glauser’s comments is irrelevant to GroupMe’s Petition which concerns only non-telemarketing, informational and administrative text messages.

¹⁴ Attachment 1, ¶20.

¹⁵ *Id.* at ¶21.

¹⁶ *Id.*

¹⁷ See Comments of Brian Glauser, CG Docket No. 02-278, at 5-7 (filed Sept. 6, 2012) (late-filed comments).

¹⁸ See Attachment 1, ¶¶15-16.

Other commenters incorrectly assert that GroupMe is a commercial service sending commercial messages based on an article that appeared in *Inc. Magazine*. Three commenters allege that GroupMe intends to send commercial text messages to GroupMe group members.¹⁹ Two claim that the text messages triggered by group creators where GroupMe informs new group members that they have been added to a group and the availability of a free application that allows for an alternative way of participation constitutes a commercial text message.²⁰ And one party asserts that GroupMe is a “for profit” company and that alone makes its text messages commercial.²¹

Unsurprisingly, none of these claims withstand scrutiny. The *Inc. Magazine* article and the excerpted quote relied on by three parties concerned GroupMe’s separate *application software*, not its text messaging service. As detailed in its Petition, GroupMe offers a free application that users can utilize to send and receive text messages either from their phones or computers to avoid text messaging fees.²² GroupMe has entered into a number of partnerships and is exploring other revenue-generating opportunities but only through the application and not through the text messaging service. Accordingly, the mistaken assertions made by some commenters concerning GroupMe’s advertising practices have no bearing on GroupMe’s text messaging service and are irrelevant to this proceeding.

¹⁹ See Comments of Brian Glauser, CG Docket No. 02-278, at 2-4 (filed Sept. 6, 2012) (late-filed comments); Comments of Robert Biggerstaff, CG Docket No. 02-278, at 2-5 (filed Aug. 28, 2012); Comments of Consumer Litigation Group, CG Docket No. 02-278, at 1 (filed Aug. 31, 2012) (late-filed comments) (referring to Mr. Biggerstaff’s claims on this point).

²⁰ See Comments of Brian Glauser, CG Docket No. 02-278, at 1-3 (filed Sept. 6, 2012) (late-filed comments); Comments of Gerald Roylance, CG Docket No. 02-278, at 13-15 (filed Aug. 30, 2012).

²¹ Comments of Gerald Roylance, CG Docket No. 02-278, at 14 (filed Aug. 30, 2012).

²² See GroupMe Petition, at 4.

The claims centered on text messages notifying users of the availability of a free application are equally meritless. Making users aware of the availability of a free application that allows users to avoid fees associated with text messaging is not evidence of a commercial communication through text message. Instead, the relevant definition of “commercial speech” adopted by the Supreme Court in *Central Hudson* is either “expression related solely to the economic interests of the speaker and its audience[,]” or “speech proposing a commercial transaction... .”²³ A text message alerting users to the availability of a free application does not meet either definition of commercial speech. Also, GroupMe’s corporate status under the law does not factor at all into the analysis of whether particular speech is either commercial or non-commercial.²⁴ In short, no parties provide a legal basis for a finding that GroupMe’s text messages are commercial.²⁵

A separate party mistakenly claims that the “complainant in the Glauser case had never provided prior express consent yet received a total of fifteen (15) text message calls to his cellular telephone number.”²⁶ The reality is that Mr. Glauser registered for a GroupMe account

²³ *Central Hudson Gas & Elec. v. Pub. Serv. Comm. of New York*, 447 U.S. 557, 561 (1980); see GroupMe Comments, at 8 (filed Aug. 30, 2012).

²⁴ Mr. Roylance further alleges that “GroupMe is soliciting, so it needs written consent.” Comments of Gerald Roylance, CG Docket No. 02-278, at 13 (filed Aug. 30, 2012). There is no further analysis beyond this disembodied statement. GroupMe assumes that Mr. Roylance was referring to the informational text message advising users of the availability of the free application and the corporate status of the company. Both of these claims do not withstand scrutiny as detailed in the accompanying text above.

²⁵ With respect to Mr. Glauser’s comments, this is particularly surprising as his comments were filed well after GroupMe’s. See generally Comments of Brian Glauser, CG Docket No. 02-278 (filed Sept. 6, 2012) (late-filed comments).

²⁶ Comments of Joe Shields, CG Docket No. 02-278, at 4 (filed Aug. 30, 2012).

and accepted GroupMe's Terms of Service.²⁷ Moreover, Mr. Glauser also participated in the group creator's group.²⁸ It is unclear what the basis is for the commenting party's incorrect statements as the citation provided is simply a generic one to the relevant court docket.²⁹ However, Mr. Shields is mistaken as the plaintiff in the Glauser litigation participated in the group conversation and agreed to GroupMe's Terms of Service. In fact, Mr. Glauser, who has now spoken twice through his lawyers — in the litigation and the FCC, has never denied that he used GroupMe to participate in the text message conversation underlying his lawsuit and then signed up for the service. We also do not see in Mr. Glauser's comments any denial that he gave his friend (the group creator) consent to send him text messages.³⁰

Despite Mr. Glauser's significant omissions about his own conduct, he continues to purport to speak on behalf of all GroupMe group text message "recipients," complaining that they are "confused and upset" about the administrative text messages they receive.³¹ Mr. Glauser also claiming to speak on behalf of group creators, states that group creators have "no idea the creation of groups will trigger text messages directly from GroupMe."³² Mr. Glauser's support for those statements is a blog post³³ from over one year ago where the writer of the blog complains he was added to a GroupMe group by a friend when he was away from his phone for

²⁷ See *Glauser v. Twilio, Inc. and GroupMe, Inc.* Civil Action No. 4:11-cv-02584-PJH (N.D. Cal.), Declaration of Steve Martocci in Support of Motion to Dismiss Amended Complaint, at ¶¶28-29 (Oct. 6, 2011).

²⁸ See *id.*

²⁹ See Comments of Joe Shields, CG Docket No. 02-278, at 4 (filed Aug. 30, 2012).

³⁰ See generally, Comments of Brian Glauser, CG Docket No. 02-278, at 3 (filed Sept. 6, 2012) (late-filed comments).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 3 n.3. The text of the blog post is included as Attachment 2.

30 minutes, and that he had 25 text messages when he returned. Mr. Glauser provides no support for his broad claims of widespread confusion, angst and surprise at receiving text messages from GroupMe when people with “personal relationships”³⁴ to the group creator are added to a GroupMe group.³⁵

III. THE COMMISSION MUST CLARIFY THE MEANING OF AN “AUTOMATIC TELEPHONE DIALING SYSTEM” UNDER THE TELEPHONE CONSUMER PROTECTION ACT

A number of parties agree that the Commission should clarify the meaning of the TCPA ATDS provision as proposed by GroupMe.³⁶ GroupMe seeks clarification that the term “capacity” encompasses *only* equipment that, at the time of use, could, in fact, have autodialed random or sequential numbers without human intervention and without first being technologically altered.³⁷ As detailed by a variety of commenters, neither the policy goals of Congress in enacting the TCPA, nor those of the Commission in implementing a regulatory scheme, support a more expansive interpretation of “capacity” that would include equipment not used to autodial or that would require alteration before being used in order to satisfy the definition of an ATDS.³⁸

It is also clear that the statute does not support interpreting the TCPA ATDS provision as inclusive of any device that has the “possibility or option” to be reprogrammed or otherwise

³⁴ See *infra* Section IV.

³⁵ See Comments of Brian Glauser, CG Docket No. 02-278, at 3 (filed Sept. 6, 2012) (late-filed comments).

³⁶ See, e.g., Comments of Twilio, Inc., CG Docket No. 02-278, at 13-15 (filed Aug. 30, 2012); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 8-11 (filed Aug. 30, 2012).

³⁷ See GroupMe Petition, at 14.

³⁸ See, e.g., Comments of Twilio, Inc., CG Docket No. 02-278, at 2-4 (filed Aug. 30, 2012); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 1-2 (filed Aug. 30, 2012).

altered. As one party emphasizes, such an interpretation results in writing the ATDS requirement out of the statute due to the fact that by virtue of using a computer in connection with telecommunications equipment, like a standard smartphone, the statute would be satisfied.³⁹ Another emphasizes that the only logical interpretation of the term “capacity” is one of equipment that has the “present capacity” to autodial random or sequential numbers.⁴⁰ These comments demonstrate the need for the Commission to clarify the meaning of the term “capacity” in the manner proposed by GroupMe.

In response, plaintiffs and plaintiffs’ attorneys argue that the TCPA’s legislative history indicates that Congress intended for the TCPA ATDS provision to broadly apply to ordinary office equipment used in conjunction with other devices.⁴¹ But none of these parties provide the full excerpt from the Congressional record. The relevant portion in its entirety follows:

It should be noted that the bill's definition of an “automatic telephone dialing system” is broad, not only including equipment which is designed or intended to be used to deliver automatically-dialed prerecorded messages, but also including equipment which has the “capability” to be used in such manner. The Committee is aware of concerns that this broad definition could cover the mere ownership of office computers which are capable, perhaps when used in conjunction with other equipment, of delivering automated messages. **Section 225(b)(2), does not impose restrictions on the ownership of such equipment, but only its active “use” to deliver automatically dialed prerecorded telephone solicitations without live operator intervention. A live operator would be able to disconnect a call to a customer, eliminating the problem of “seizing” a customer’s**

³⁹ See Comments of Twilio, Inc., CG Docket No. 02-278, at 13-14 (filed Aug. 30, 2012); *see also*, GroupMe Petition, at 10-12 (explaining that this sort of interpretation of the TCPA ATDS provision allows for retail consumers using smartphones to be subject to TCPA liability).

⁴⁰ See Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 5-9 (filed Aug. 30, 2012).

⁴¹ See Comments of Brian Glauser, CG Docket No. 02-278, at 15 (filed Sept. 6, 2012) (late-filed comments); Comments of Robert Biggerstaff, CG Docket No. 02-278, at 5 (filed Aug. 28, 2012); Comments of Joe Shields, CG Docket No. 02-278, at 2 (filed Aug. 30, 2012). Notably, all parties provide the same incomplete snippet of legislative history.

line. The bill does not apply to ADRMP solicitations that include live operator intervention.⁴²

Once read in total, it is apparent that this portion of the legislative history, to the extent there is any guidance at all, supports GroupMe’s proposed interpretation since text messaging does not interfere with the calling functionality of wireless telephones, nor does GroupMe’s service allow for the delivery of “prerecorded telephone solicitations.”

One plaintiffs’ attorney argues that the Commission has already clarified the meaning of the term “capacity” as it applies to the TCPA ATDS provision.⁴³ But a review of the *2003 TCPA Order* and the rules adopted pursuant to the order reveal that “capacity” is not a defined term.⁴⁴ Tellingly, this commenter does not provide the definition of “capacity” allegedly adopted by the Commission, as it does not exist, but instead points to text from the *2003 TCPA Order* concerning the definition of an ATDS.⁴⁵ The commenter also incorrectly asserts that courts have relied on Commission guidance when interpreting “capacity” under the ATDS.⁴⁶ Instead, the court in *Satterfield* looked to the Commission’s definition of a “call” under the TCPA, not “capacity.”⁴⁷

⁴² H.R. REP. 101-633, 101ST Cong., 2ND Sess. 1990, 1990 WL 259268 (emphasized text is the portion missing from the relevant opposing parties’ comments).

⁴³ See Comments of Brian Glauser, CG Docket No. 02-278, at 9-11 (filed Sept. 6, 2012) (late-filed comments).

⁴⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014 (2003) (“*2003 TCPA Order*”); 47 C.F.R. § 64.1200 *et seq.*

⁴⁵ See Comments of Brian Glauser, CG Docket No. 02-278, at 10 (filed Sept. 6, 2012) (late-filed comments).

⁴⁶ See *id.* at 11.

⁴⁷ See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009) (“Therefore, the FCC has determined that a text message falls within the meaning of ‘to make any call’ in 47 U.S.C. § 227(b)(1)(A).”) (internal citations omitted).

Mr. Glauser also incorrectly characterizes GroupMe’s request as one that would add language to the TCPA.⁴⁸ Mr. Glauser wrongly asserts that what GroupMe would like to do is change the meaning from “capacity” to “*current capacity*.”⁴⁹ As the U.S. Chamber of Commerce aptly explained, the correct interpretation of the reference to “capacity” in the TCPA ATDS provision is “present capacity” and not “future capacity” as advocated by Mr. Glauser.⁵⁰

A separate party suggests that the Commission broaden the definition of an ATDS such that it would include any device that could store and dial a telephone number without human intervention.⁵¹ Mr. Roylance alternatively suggests that “Congress knows how to write statutes[.]”⁵² and “Any suggestion that Congress did not want that result is ludicrous[.]”⁵³ then devotes seven single-spaced pages as to why the statute as drafted does not make sense and proposes an alternative interpretation.⁵⁴ The crux of Mr. Roylance’s position appears to be “If the system stores numbers and later dials those numbers without human intervention, then it is an ATDS.”⁵⁵ Mr. Roylance’s proposal is for the Commission to ignore the remaining statutory language that refers to random and sequential dialing.

⁴⁸ See Comments of Brian Glauser, CG Docket No. 02-278, at 12 (filed Sept. 6, 2012) (late-filed comments).

⁴⁹ *Id.*

⁵⁰ See Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 6-9 (filed Aug. 30, 2012). It is unclear why Mr. Glauser did not respond to the U.S. Chamber of Commerce’s analysis of the proper interpretation of “capacity” in the statute given that Mr. Glauser filed comments one week later than these comments.

⁵¹ Comments of Gerald Roylance, CG Docket No. 02-278, at 12 (filed Aug. 30, 2012).

⁵² *Id.* at 5.

⁵³ *Id.*

⁵⁴ See *id.* at 6-12.

⁵⁵ *Id.* at 12.

Of course, statutory interpretation requires giving effect to each statutory term as much as possible.⁵⁶ Moreover, Mr. Roylance's proposal would exacerbate the problems associated with the TCPA as it would allow for application of the TCPA to consumer smartphones, which is completely at odds with the intent of the statute.⁵⁷ Indeed, even Mr. Roylance attempts to distinguish calls and text messages made using a smartphone yet his proposed definition would capture such communications.⁵⁸ Accordingly, the Commission should reject Mr. Roylance's proposed interpretation of an ATDS.

Plaintiffs and plaintiffs' attorneys next argue that the Commission should not adopt GroupMe's proposed definition as the Commission would open the flood gates for spam via text messages and that there would be no way for the Commission to distinguish GroupMe's system from predictive dialers.⁵⁹ But in granting the relief requested by GroupMe, the Commission would not be opening the door for spam. GroupMe's Petition concerns only non-telemarketing,

⁵⁶ One party attempts to argue that GroupMe's proposed definition of "capacity" would ignore the reference to "storage" in the TCPA ATDS provision. *See* Comments of Brian Glauser, CG Docket No. 02-278, at 12-13 (filed Sept. 6, 2012) (late-filed comments). Mr. Glauser is mistaken. GroupMe's petition addresses a machine's ability to actually autodial stored and/or generated telephone numbers at the time of use, as opposed to a hypothetical ability to do so subject to first undergoing technological alterations.

⁵⁷ *See* GroupMe Petition, at 10-12.

⁵⁸ Comments of Gerald Roylance, CG Docket No. 02-278, at 5 (filed Aug. 30, 2012) ("When I manually dial a number, I'm not dialing a stored or generated number. I'm dialing a number in my head."). What this ignores is that under Mr. Roylance's proposed definition of "capacity," the fact that the smartphone could be used or altered to autodial calls would be enough to subject it to TCPA liability. In fact, one party highlighted that some plaintiffs' attorneys have already argued that manually dialing a call is no defense to a TCPA class action lawsuit. *See* Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 10-11, 10 n.38 (filed Aug. 30, 2012).

⁵⁹ *See* Comments of Robert Biggerstaff, CG Docket No. 02-278, at 5-7 (filed Aug. 28, 2012); Comments of Consumer Litigation Group, CG Docket No. 02-278, at 2 (filed Aug. 31, 2012) (late-filed comments); Comments of Brian Glauser, CG Docket No. 02-278, at 16-20 (filed Sept. 6, 2012) (late-filed comments).

informational, and administrative text messages such that any clarification the Commission provides would be so limited.

Moreover, the tortured hypotheticals proposed by one party suggesting that spammers would model their systems to mirror GroupMe's should the Commission grant the relief sought in the Petition are unconvincing.⁶⁰ The inherent weakness with all of the speculative machines and harms imagined by Mr. Glauser is that GroupMe's Petition is limited to non-telemarketing, informational and administrative communications. Thus, use for a commercial purpose would not provide spammers with any protection from the TCPA as a result of granting GroupMe's Petition.

It is also possible for the Commission to distinguish GroupMe's service from predictive dialers. As defined by the Commission a "predictive dialer" is:

[A]n automated dialing system that uses a complex set of algorithms to automatically dial consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. Such software programs are set up in order to minimize the amount of downtime for a telemarketer. In some instances, a consumer answers only to hear "dead air" because no telemarketer is free to take the call.⁶¹

Predictive dialers also use a database of numbers comprised of numbers determined according to a criteria and dials thousands of numbers.⁶²

A significant difference between GroupMe's system and predictive dialers is that GroupMe is responsible for a limited set of communications as opposed to predictive dialers that initiate thousands of communications. The non-telemarketing, informational and administrative

⁶⁰ See Comments of Brian Glauser, CG Docket No. 02-278, at 18-19 (filed Sept. 6, 2012) (late-filed comments).

⁶¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act*, Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14022 n.31 (2003).

⁶² See *id.* at 14091-92.

text messages triggered in response to the creation of group sent by GroupMe are few. Another distinction is that GroupMe's service does not rely on predictive dialer algorithms. Instead, GroupMe's text messages are triggered for a limited time when a group is created. Thereafter, it enables communications initiated by other parties. Additionally, the numbers that populate GroupMe's database are placed there by a group creator to enable communications among the creator and the group member. The purpose of the database is to allow for communications between the group creator and members of the group, unlike parties that use predictive dialers to allow for communications between them and the numbers included in the predictive dialer database. Finally, the members of a GroupMe group have a "personal relationship" with the group creator.⁶³ Accordingly, the Commission can distinguish GroupMe's service from predictive dialers.

IV. THE COMMISSION SHOULD CLARIFY THAT INTERMEDIARY CONSENT IS PERMISSIBLE WHEN SENDING NON-COMMERCIAL TEXT MESSAGES

The record clearly illustrates that there are many times when obtaining prior express consent directly from the recipient of a call or text message is simply not possible.⁶⁴ Numerous parties recognize that non-telemarketing, informational, administrative text messages are communications that wireless subscribers want to receive,⁶⁵ do not constitute an invasion of priva-

⁶³ See *infra* Section IV.

⁶⁴ See, e.g., Comments of Cargo Airline Association, CG Docket No. 02-278, at 2 (filed Aug. 30, 2012).

⁶⁵ See, e.g., Petition of Cargo Airline Association, CG Docket No. 02-278, at 2-3 (filed Aug. 17, 2012) (detailing all of the circumstances when a recipient of a package would want to receive a text message where the package delivery company relies on intermediary consent); Twilio, Inc., at 15 (asserting that wireless subscribers want to receive non-commercial text messages).

cy,⁶⁶ and do not serve the pecuniary interest of the party sending such messages so that there is no incentive for the sender to harass the recipient.⁶⁷ Schools sending information to caregivers, banks alerting consumers to fraudulent account activity, and package delivery companies notifying recipients that a parcel awaits are a small sampling of the type of communications that wireless subscribers depend upon and wish to receive. The Commission understands the importance of these communications and that neither the law nor its implementing regulations should unnecessarily restrict them.⁶⁸ Interpreting the TCPA ATDS provision otherwise is inconsistent with its legislative history,⁶⁹ does not further the policy goals identified by the Commission,⁷⁰ and impermissibly burdens constitutionally protected speech in violation of the

⁶⁶ See, e.g., GroupMe Petition, at 13-14 (noting that Congress passed the TCPA to regulate commercial, mass produced speech); GroupMe Comments, CG Docket No. 02-278, at 9-10, 10 n.24, n.25 (filed Aug. 30, 2012) (highlighting that the Congressional record demonstrates that consumer expectations are different with respect to non-commercial speech and such communications are less intrusive); Comments of Twilio, Inc., CG Docket No. 02-278, at 2-3 (filed Aug. 30, 2012) (emphasizing that the Congressional records shows that the TCPA was meant to regulate intrusive and unwanted telephone solicitations).

⁶⁷ See, e.g., Comments of Cargo Airline Association, CG Docket No. 02-278, at 3 (filed Aug. 30, 2012) (agreeing that Congress did not enact the TCPA to restrict non-commercial, informational text messages); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 11-13 (filed Aug. 30, 2012) (providing both judicial and FCC precedent for clarifying that intermediaries can provide consent when text messages are non-commercial and highlighting that there is no incentive to send unwanted non-commercial text messages).

⁶⁸ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at ¶ 21 (2012) (“2012 TCPA Order”) (finding that requiring prior express written consent “would unnecessarily restrict consumer access to information” of import).

⁶⁹ See, e.g., GroupMe Petition, at 12-14 (explaining that the harms identified by Congress are irrelevant to the GroupMe service); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 1-3 (filed Aug. 30, 2012) (citing to official Senate and House reports detailing that the TCPA was intended to address consumer complaints concerning the volume of *telemarketing* calls and the use of automated dialers to place such calls).

⁷⁰ See Comments of Twilio, Inc., CG Docket No. 02-278, at 2-4 (filed Aug. 30, 2012); Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 13 (filed Aug. 30, 2012).

First Amendment.⁷¹ Accordingly, the Commission should clarify that for non-telemarketing, informational, administrative calls or text messages to wireless numbers, which can be permissibly made using an ATDS under the TCPA with the called party's oral prior express consent, the caller can rely on a representation from an intermediary that such intermediary has obtained the requisite consent from the called party.⁷²

Relying on the consent of an intermediary is not without precedent. As one party emphasizes, judicial doctrine supports the concept and there is no incentive for abuse when intermediaries consent for others to receive non-telemarketing, informational, administrative text messages.⁷³ Additionally, the clarification GroupMe seeks with respect to intermediary consent is similar to the Commission's exception in the "do-not-call" rules where the rules do not apply when calls are "made to persons with whom the marketer has a 'personal relationship.'"⁷⁴ A "personal relationship" refers to "an individual personally known to the telemarketer making the call."⁷⁵ The Commission found that:

In such cases, we believe that calls to family members, friends and acquaintances of the caller will be both expected by the recipient and limited in number. Therefore, the two most common sources of consumer frustration associated with telephone solicitations - high volume and unexpected solicitations - are not likely present when such calls are limited to persons with whom the marketer has a personal relationship.⁷⁶

⁷¹ See GroupMe Comments, CG Docket No. 02-278, at 7-14 (filed Aug. 30, 2012).

⁷² See GroupMe Petition, at 18.

⁷³ Comments of U.S. Chamber of Commerce, CG Docket No. 02-278, at 11-13 (filed Aug. 30, 2012).

⁷⁴ 2003 TCPA Order, 18 FCC Rcd 14014, 14045; 47 C.F.R. § 64.1200(c)(2)(iii).

⁷⁵ *Id.*

⁷⁶ 2003 TCPA Order, 18 FCC Rcd at 14045.

The Commission exercised its discretion to develop a reasonable carve out to the “do-not-call” rules allowing telemarketing when the telemarketer has a “personal relationship” with the called party even if the recipient of the call is registered on the national “do-not-call” list.⁷⁷

With respect to GroupMe’s request for clarification of intermediary consent for non-telemarketing, informational, administrative text messages, the policy justifications are even stronger than those already recognized by the “personal relationship” exception to the “do-not-call” rules. As explained in detail by GroupMe, its service enables non-commercial text messages among small groups of people.⁷⁸ These groups commonly consist of family members, parents whose children are on the same sports team, volunteer and professional emergency workers, cancer support groups, etc.⁷⁹ In short, groups where the group creator has a “personal relationship” with its members. The types of communications that ensue are non-commercial, meaning that they are not uninvited communications and they are not high volume. Thus, if it is sound public policy to exclude from the “do-not-call” rules telemarketing calls made by people with a “personal relationship” to the called party, it is equally and even better public policy to allow the same for a non-commercial communications enabled by a service that eases group communications but only when the group creator has a “personal relationship” with the members of the group.

In response to the sound public policies that such a clarification would serve, plaintiffs and plaintiffs’ attorneys mistakenly interpret the TCPA or fail to identify countervailing, persuasive policies that would promote their perspective. For example, one party asserts that “strict

⁷⁷ See *id.*, at 14045-46.

⁷⁸ See GroupMe Petition, at 5, 13.

⁷⁹ See *GroupMe July 18 Ex Parte*, Attachment 1, at 5, 10.

vicarious liability is the only bar to wholesale abuse of all cost-shifted advertising mediums, including SPAM e-mail (CAN-SPAM Act) and junk faxes (TCPA).”⁸⁰ However, GroupMe has made clear that its Petition concerns non-telemarketing text messages. Thus, there is no cost-shifting advertising as there is no advertising. Moreover, the Commission’s rules implementing the TCPA allow for both fax broadcasters and common carriers to avoid liability for unlawful facsimiles which is the antithesis of “strict vicarious liability.”⁸¹ Likewise, Mr. Glauser’s opposition to proposed clarification centers on reasons related to commercial text messages, not non-telemarketing, informational, and administrative text messages and, as such, are irrelevant to the clarification sought by GroupMe.⁸² Other alleged reasons for prohibiting intermediary consent posited by some parties include: maintaining a “moral hazard,”⁸³ easing lawsuits against GroupMe for users’ violations of the Terms of Service,⁸⁴ and arguing that clarification is unnecessary as GroupMe is indemnified by its users.⁸⁵ Each of these arguments fails.

It is not entirely clear what “moral hazard” the commenter is referring to but presumably it would be class action lawsuits enabled by plaintiffs’ attorneys’ misinterpretation of the TCPA.

⁸⁰ Comments of Robert Biggerstaff, CG Docket No. 02-278, at 10 (filed Aug. 28, 2012).

⁸¹ See *2003 TCPA Order*, 18 FCC Rcd 14014, 14131 (2003) (exempting fax broadcasters from liability under certain conditions); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8799-80 (1992) (providing that common carriers are not liable for the transmission of unlawful facsimiles).

⁸² See Comments of Brian Glauser, CG Docket No. 02-278, at 20-26 (filed Sept. 6, 2012) (late-filed comments).

⁸³ See Comments of Robert Biggerstaff, CG Docket No. 02-278, at 10 (filed Aug. 28, 2012).

⁸⁴ See *id.*, at 9.

⁸⁵ See *id.* at 8-10; Comments of Brian Glauser, CG Docket No. 02-278, at 27-28 (filed Sept. 6, 2012) (late-filed comments); see, e.g., Comments of Gerald Roylance, CG Docket No. 02-278, at 13 (filed Aug. 30, 2012) (“If the [user] representation is not true, then GroupMe can (and should) be sued, but it can seek indemnity from the group creator”).

GroupMe disagrees that the TCPA ever intended to create a moral hazard with respect to non-commercial text messages. The overall architecture of the Act is to regulate, *not prohibit*, commercial speech. Indeed, aside from the obvious constitutional concerns,⁸⁶ it would be odd for a statute that is aimed at *regulating* commercial speech to *forbid* non-commercial speech.

Moreover, GroupMe is not insulated from risk in offering its service. GroupMe has already incurred substantial risk in creating an innovative, social media platform empowering users to make use of the tool as they see fit so long as it is not used for commercial purposes. GroupMe has devoted time and resources in order to provide a free service. If it fails to create a way to support the service financially, jobs will be lost and a popular and useful communications platform may no longer be available to the public. As such, GroupMe is subject to a moral hazard far greater than Congress, the Commission or even plaintiffs' lawyers can create.⁸⁷

Next, there is no compelling public policy reason for preserving plaintiffs' attorneys' ability to sue GroupMe for users' violation of the Terms of Service. If a plaintiff has been harmed and wants to pursue a lawsuit under the TCPA, why shouldn't the plaintiff sue the individual that engaged in the unlawful activity? More importantly, even if a user violates the Terms of Service and sends a commercial text message, GroupMe still does not send such a message. In all instances, GroupMe sends a limited number of non-telemarketing, informational, administrative messages even if a user misuses its service. The fact that a user has violated the Terms of Service and sent a commercial text message does not transform the content of GroupMe's non-telemarketing, informational, administrative text messages. The commenter essential-

⁸⁶ See Comments of GroupMe, Inc., at 7-14 (filed Aug. 30, 2012).

⁸⁷ To be sure, the threat of class action litigation where tens of millions of dollars in damages are sought is not insignificant. But measured against job loss and potentially decommissioning a useful communication medium, there already is plenty of moral hazard associated with GroupMe's venture.

ly argues that the Commission should allow plaintiffs' attorneys to sue everyone and let courts sort it out. As explained *supra*, this is pretty much the situation that exists today and is hardly a persuasive reason that should deter the Commission from clarifying the intermediary consent issue as proposed by GroupMe.

Additionally, plaintiffs and plaintiffs' attorneys propose that the intermediary consent issue need not be clarified because GroupMe can engage in its own litigation against its users by virtue of the indemnification clause in its Terms of Service. These commenting parties ask that the Commission allow a world where multiple lawsuits between people sending non-telemarketing text messages to continue to persist. Left unanswered by this proposed solution is how consumer protection, the underlying purpose of both the TCPA and the Commission's implementing regulations, are served by allowing litigation to continue? In fact, if plaintiffs and plaintiffs' attorneys had to sue the group creators directly – potentially, schools, their banks sending fraud alerts, soccer coaches, package delivery services, as well as family and friends – and not GroupMe, GroupMe would not be before the Commission seeking relief, nor would many of the other parties seeking various forms of relief from the Commission. A good example is the lawsuit brought by Mr. Glauser against GroupMe where, but for a tortured interpretation of the TCPA, Mr. Glauser would be suing a friend that invited him to join a poker group and used GroupMe to manage the communications among members of the group. Faced with such a prospect, it is hard to imagine that there would be any litigation associated with group text messaging that occurred over organizing a poker game.⁸⁸

⁸⁸ See *supra* n. 27.

Finally, one party alleges that allowing for intermediary consent “may force the cost of receiving text message calls on an unwilling recipient.”⁸⁹ Yet, anytime someone sends a text message to another individual one may “force the cost of receiving text messages . . . on an unwilling recipient.” It is the nature of wireless providers’ service plans that may result in a text message recipient incurring a cost, not GroupMe.⁹⁰ Once again, GroupMe provides a service that streamlines and improves group conversations, but no text messages are triggered without a group creator using the service. It certainly was neither the intent of Congress nor the Commission to subject individuals to liability for statutory damages for sending text messages to acquaintances, family, friends, etc., yet this result is exactly what is occurring due to overzealous plaintiffs’ attorneys.⁹¹

⁸⁹ Comments of Joe Shields, CG Docket No. 02-278, at 4 (filed Aug. 30, 2012).

⁹⁰ Moreover, the two largest wireless carriers are moving to new pricing plans where voice and text is unlimited, but data is metered meaning that for most wireless customers there will be no cost for text messages. *See, e.g.*, Verizon Share Everything Plans, <http://tinyurl.com/d3so4pg>; AT&T Mobile Share Plans, <http://tinyurl.com/bp4nomc> (last visited Sept. 10, 2012). These nationwide wireless data service plans all include unlimited talk and texting, as do many service plans offered by many other carriers, both on a “family” and “individual” basis.

⁹¹ *See generally* GroupMe Petition, at 3, 12.

V. CONCLUSION

For the reasons set forth herein, GroupMe respectfully requests expedited consideration of the Petition, clarification of the term “capacity” to encompass only equipment that, at the time of use, could, in fact, have autodialed random or sequential numbers without human intervention and without first being technologically altered, and clarification that wireless subscribers may consent to receive non-commercial, administrative, or informational calls or text messages through an intermediary.

Respectfully submitted,

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